Filed 6/29/10 Sood v. Grief CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

VICTORIA TRAN SOOD, Petitioner and Appellant, v. KARLINE GRIEF, et al., Respondents.	H033875 (Santa Clara County Super. Ct. No. PR161665)

This appeal follows the denial of an attorney fee petition brought in probate court. The court denied the petition on the grounds that it was time-barred and that there was no evidence to support a claim of equitable estoppel.

For reasons explained below, we shall affirm.

BACKGROUND

The petitioner and appellant, Victoria Tran Sood, is an attorney who previously represented Marjorie Grief (Marjorie or Mrs. Grief). Appellant represented Marjorie from December 2005 until August 2006. At the outset of the representation, Marjorie gave appellant an initial deposit of $3,000, but she paid no fees thereafter. The attorney-client relationship ended when the court granted appellant's motion to withdraw as attorney of record.

The respondents are beneficiaries of the Grief Living Trust, which was established by Marjorie and her husband Gene Grief, acting through his conservator. The trust was created in February 2007, months after appellant had ceased representing Marjorie. The trust is part of an estate plan for Marjorie and Gene Grief, established following a long, difficult, and contentious process involving many parties and their representatives. That process was finally concluded by settlement, approved by the court in February 2007. The settlement agreement includes a provision for the payment of attorney fees to named counsel, upon court approval, when the trust estate had "sufficient liquidity." Appellant was not among the attorneys specified in the settlement agreement. At the time the settlement was approved, appellant withdrew her request for special notice in the conservatorship case.

Marjorie died on February 27, 2007, four days after the court approved the settlement agreement creating the trust. Appellant learned of Marjorie's death the following summer, when she ran into Diane Brown, one of the attorneys involved in the case.

In December 2007, after learning of other counsel's plans to petition the court for fees, appellant submitted her "fee declaration and invoices" to Richard Gorini, counsel for Gene Grief's conservator, "to file together with other counsel's fee declarations in one fee petition." In early January 2008, Gorini returned appellant's papers, explaining in a cover letter that counsel were petitioning for fees separately, from either the conservatorship or the trust.

In March 2008, more than a year after Marjorie's death, appellant sought her unpaid fees from the Grief Living Trust. After an evidentiary hearing in July 2008, the court denied appellant's fee petition. The court concluded that appellant's claim for fees was "barred by the statute of limitations." The court also rejected appellant's equitable estoppel argument on the ground of insufficient evidence.

This appeal followed. (Prob. Code, § 1300, subd. (e).)

DISCUSSION

I. Statute of Limitations

A. Legal Principles

The relevant limitations statute is Code of Civil Procedure section 366.2.[1]

Section 366.2 "provides for an outside time limit of one year for filing any type of claim against a decedent." (*Dobler v. Arluk Medical Center Industrial Group, Inc.* (2001) 89 Cal.App.4th 530, 535.) "This uniform one-year statute of limitations applies to actions on all claims against the decedent which survive the decedent's death." (*Ibid*.) It applies to all claims that "exist at the time of a person's death." (*Battuello v. Battuello* (1998) 64 Cal.App.4th 842, 846.) If the time limit is not met, "a creditor will be forever barred from asserting a claim against the decedent." (*Dobler v. Arluk Medical Center Industrial Group, Inc.*, at p. 536.) These time limits apply both to claims against probate estates and to claims against "the assets of a revocable trust of a deceased settlor." (*Id.* at p. 537.) "The language is clear that the one-year statute applies to all debts of the decedent regardless of whom the claims are brought against." (*Levine v. Levine* (2002) 102 Cal.App.4th 1256, 1265.)

As appellant observes, however, the statutory "language contemplates a cause of action that could have been asserted against the decedent while he was alive." (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 552.) "A cause of action *exists* (or 'arises')

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[1] That provision states in pertinent part:

"If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply." (§ 366.2, subd. (a).)

Unspecified statutory references are to the Code of Civil Procedure.

when all the elements it comprises have come into being so that an action may be brought." (*Id.* at p. 553.) The existence of a cause of action is distinct from its accrual. (*Ibid.*; see also, e.g., *In re Estate of Yool* (2007) 151 Cal.App.4th 867, 876-877.)

B. Analysis

In this case, appellant contends, her claim for fees against Marjorie did not exist "until her estate had liquidity." Although appellant's written fee agreement with Marjorie contains no provision making payment contingent on liquidity, appellant asserts that the fee agreement was modified by an executed oral agreement. (See Civ. Code, § 1698, subd. (b); *Coldwell Banker & Co. v. Pepper Tree Office Center Associates* (1980) 106 Cal.App.3d 272, 279, disapproved in part by *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1370-1371 ["burden of proof for oral modification of a written contract is a preponderance of the evidence"].)

At the hearing on her fee petition, appellant submitted in evidence the written fee agreement, which Marjorie had signed in December 2005. By its terms, the agreement required Marjorie to make an initial deposit of $3,000; to maintain a balance of $5,000 in a trust account during the engagement; and to pay monthly invoices "upon presentation." The agreement recites that it "constitutes the entire agreement between Attorneys and Client" and it explicitly requires any modification to be in writing.

Despite the fee agreement's written terms, appellant asserts that she and her client "orally and through conducts agreed that Mrs. Grief did not owe Appellant until Mrs. Grief had liquidity of funds." In appellant's words, "the evidence overwhelmingly shows that Mrs. Grief and Appellant's conducts, which were in conformity with their oral agreement, replaced the payment terms in the Fee Agreement with the payment term that

allowed Mrs. Grief to delay payment until she had liquidity of funds." The only evidence cited by appellant in support of that assertion is her own testimony.[2]

The trial court rejected appellant's assertion of oral modification, saying: "There is no credible evidence before the Court that the Fee Agreement was modified by the parties."

Appellant posits the court's finding on this point as an error of law, subject to de novo review. We disagree with appellant's characterization. "Resolution of the statute of limitations issue is normally a question of fact." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810.) Here, the trial court applied the limitations statute based on its factual determination that appellant failed to prove oral modification of the written fee agreement. Our review, therefore, is deferential.

Where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court is whether the evidence compels a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571.) The question on appeal is not whether the appellants "failed to prove their case by a preponderance of the evidence. That was a question for the trial court and it was resolved against them. The question for this court to determine is whether the evidence compelled the trial court to find in their favor on that issue." (*Ibid.*) To decide that question, the reviewing court considers whether the appellant's evidence was both "uncontradicted and unimpeached"

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[2] Appellant testified that her fee agreement "usually requires the client to pay within 30 days after the invoice is presented. But . . . usually it's not strongly enforced and it's always the understanding between the client [*sic*] as the case be developed [*sic*]. In Ms. Grief's case the – the understanding was that she's not going to have any cash any time until one of the real property [*sic*] was sold." When asked by the court whether she "had an agreement collecting your fees that's not in this agreement," appellant replied: "It's more of an oral discussion and understanding that's not part of this agreement. I would say that as [*sic*] evolved from this agreement. The hourly rate and – and how that rate increases or decreases would be based upon this agreement. But the parties define their – their – the terms of the payment as the case develop [*sic*]."

and "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." (*Id.* at p. 571; cf. *In re Sheila B.* (1993) 19 Cal.App.4th 187, 198-199 ["court's conclusion that the evidence presented by the moving party was insufficient to prove its case" reviewed for substantial evidence].)

On this record, we are compelled to uphold the trial court's determination that appellant failed to prove oral modification of the fee agreement. The trial court is the exclusive judge of the credibility of the evidence and can reject evidence as unworthy of credence. (*Oldenburg v. Sears, Roebuck & Co.* (1957) 152 Cal.App.2d 733, 742.) Indeed, the trial court may entirely reject uncontradicted testimony of a witness if it concludes the testimony is not believable. (*Hicks v. Reis* (1943) 21 Cal.2d 654, 659-660.) The trial court did so here, finding "no credible evidence" to support appellant's claim of modification. That finding is unassailable. Patently, appellant's testimony is not "of such a character and weight" that it compels a judicial finding in her favor. (*Roesch v. De Mota, supra,* 24 Cal.2d at p. 571.)

Lacking proof of oral modification, the written terms of the fee agreement govern. Under those terms, appellant's fee claim could have been asserted against Marjorie while she was alive. "Since such a cause of action existed, section 366.2 applied to this case." (*Battuello v. Battuello, supra,* 64 Cal.App.4th at p. 847.)

II. Equitable Estoppel

A. Legal Principles

"The doctrine of equitable estoppel affirms that a defendant may not by his statements or conduct lull the plaintiff into a false sense of security resulting in inaction." (*Cuadros v. Superior Court* (1992) 6 Cal.App.4th 671, 675; see Evid. Code, § 623.) The doctrine thus prevents parties from asserting the statute of limitations as a defense in cases where their conduct has induced a delay in filing suit. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363,

384.) As this court put it: "If, by misrepresenting or concealing the facts, a defendant induces a plaintiff to delay filing an action, the defendant will be estopped from taking advantage of his wrongful conduct." (*Stalberg v. Western Title Ins. Co.* (1994) 27 Cal.App.4th 925, 931.) For the equitable estoppel doctrine to apply, the plaintiff must have "reasonably relied" on the claimed concealment or misrepresentation "in not bringing a lawsuit within the statutory period." (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1154; accord, *Lantzy v. Centex Homes*, at p. 384.) Equitable estoppel principles may forestall the operation of section 366.2, where the decedent's representative has induced a creditor not to timely file a claim. (*Bradley v. Breen* (1999) 73 Cal.App.4th 798, 803; *Battuello v. Battuello*, *supra*, 64 Cal.App.4th at p. 848.)

"The determination of whether a defendant's conduct is sufficient to invoke the doctrine is a factual question entrusted to the trial court's discretion." (*Cuadros v. Superior Court*, *supra*, 6 Cal.App.4th at p. 675.) "Therefore, we review the trial court's ruling in the light most favorable to the judgment and determine whether it is supported by substantial evidence." (*Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1360.)

B. Analysis

Appellant asserts several factual bases for her equitable estoppel claim. According to appellant: "The failure of Mrs. Grief and/or her estate to notify Appellant about the Settlement Agreement and Mrs. Grief's death constitutes constructive fraud, and thus equitable estoppel applies to avoid inequities." Appellant also mentions a request by attorney Gorini that she lift her request for special notice, characterizing it as another ploy to keep her "in the dark" about developments in the case. According to appellant: "By hiding the information from Appellant, Mrs. Grief or estate was hoping that the statute of limitations would run to bar Appellant from asserting her interest in Mrs. Grief's estate."

The trial court rejected these assertions, finding neither concealment nor inducement. The record amply supports the court's findings.

1. Concealment

Addressing appellant's ignorance about developments in the case, the trial court placed responsibility squarely on appellant herself. The court found that appellant "made no real effort to keep informed about what was going on in the case. She did not look at the court file and did not pursue collection of the fees she claimed she was due." In the court's words, "it is very clear that Petitioner did not review the court files in the various cases involving the Griefs after her withdrawal. Had she done so, she would have seen the Trust file, which brought the trust created in the settlement before the Court. She would also have seen the settlement agreement, which had been approved by the Court in February, 2007. Her failure to review the court files was not induced by any of the parties involved in the case." As for appellant's decision to lift her request for special notice, the court said: "This was apparently done as part of a refinancing process on some property. There is no credible evidence that the lifting of the Special Notice Request induced or in any way caused Petitioner to fail to pursue her fee claim until after the one year statute had run."

The trial court's findings enjoy ample evidentiary and legal support. "It is settled that when the party to be estopped does not say or do anything, its silence and inaction may support estoppel only if it had a duty to speak or act under the particular circumstances." (*Feduniak v. California Coastal Com., supra,* 148 Cal.App.4th at p. 1362.) Here, appellant acknowledges that Marjorie and her representatives were "not required under the law to serve Appellant" with the pertinent documents after her "Request for Special Notice was withdrawn." But appellant nevertheless argues that "Mrs. Grief and her estate could not hide behind the curtain of 'no duty' to keep Appellant in the dark." That argument lacks merit.

Appellant relies on *Cuadros v. Superior Court*, *supra,* 6 Cal.App.4th 671. That case does not assist her. As the court said there: "While we do not impose upon

defendants an affirmative duty to disclose to petitioner her error, defense counsel is prohibited from taking willful action to mask that error from petitioner." (*Id.* at 677.) The element of willful action is missing here. There is no evidence that any counsel prevented appellant from learning about the Grief cases. To the contrary, by the summer of 2007 – well before the statute of limitations had run – appellant had been advised by attorney Diane Brown that Marjorie had died, that the parties "had reached a settlement agreement" and that the attorneys involved would be seeking their fees. As the trial court determined, appellant simply failed to act on this information. This is not a case of concealment or misrepresentation.

2. Inducement

The court likewise rejected appellant's "claims that she was induced to delay filing her claim for fees by the actions of other attorneys in the case." In the court's words: "There is simply insufficient evidence to support that any of the attorneys induced or promised Petitioner anything which related to her fees."

The record supports that determination. Attorney Diane Brown testified that she never told appellant "that she did not need to pursue" her own bill for legal services rendered to Marjorie. The same is true of attorney Richard Gorini, who testified that he never advised appellant "that she did not need to present her fee request" to the court. Appellant herself testified only that her "understanding . . . after talking to Ms. Brown was that counsel involved in the case would be paid from the settlement agreement." Appellant did not realize until later that the settlement agreement did not include her. But there is no evidence that Brown, or Gorini, or anyone else said or did anything to indicate either that appellant would be paid under the settlement agreement or that she should delay seeking her fees.

This evidentiary record "is devoid of any indication that [counsel's] conduct *actually and reasonably induced [appellant] to forbear suing within*" the statutory

period. (*Lantzy v. Centex Homes, supra,* 31 Cal.4th at p. 385.) Nothing in counsel's conduct or statements "would have obviated the need for suit." (*Ibid.*; see also, e.g., *Stalberg v. Western Title Ins. Co., supra,* 27 Cal.App.4th at p. 932 [defendant's misrepresentations "could not have induced plaintiffs to delay filing" their action].) Contrary to appellant's contentions, this case is not like *Battuello v. Battuello, supra,* 64 Cal.App.4th 842. In that case, the defendant "convinced" the plaintiff "not to file a timely suit." (*Id.* at p. 848.) Here, by contrast, evidence of inducement is lacking.

CONCLUSION

As the trial court properly determined, (1) appellant's claim for attorney fees is time-barred under section 366.2, and (2) there is no basis for applying the doctrine of equitable estoppel.

DISPOSITION

We affirm the order filed August 14, 2008, which denied appellant's petition for fees. Respondents shall have their costs on appeal.

McAdams, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Duffy, J.